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Supreme Court of the United States

OCTOBER TERM, 1951

NO. 444 9

WILBUR C. KING, JERRY W. CARTER, and RICHARD A. MACK, as and constituting the FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

Appeal from The United States District Court for the Northern District of Florida

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BRIEF FOR THE APPELLANTS

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Opinion Below

The opinion of the District Court for the Northern District of Florida, Tallahassee Division, (R. 132) is reported in 101 F. Supp. 941. However, a copy of said opinion has been printed as Appendix A to Appellants' Statement as to Jurisdiction.

Jurisdiction

The judgment of the District Court (R. 140) was entered on July 17, 1951. The jurisdiction of this Court is invoked under Title 28, United State Code, Sections 1253 and 2101(b). Probable jurisdiction was noted by this Court on January 2, 1952 (R. 824).

Questions Presented

1. When the common carrier railroads are making substantial profits from their freight service, may the Interstate Commerce Commission, in the exercise of its 13th Section powers under The Interstate Commerce Act, lawfully nullify state-prescribed freight rates and, in lieu thereof, impose excessive and unreasonably high rates upon intrastate shippers so as to enable the railroads to offset enormous losses sustained through the operation of their passenger service?

2. In the exercise of its 13th Section powers under The Interstate Commerce Act, can the Interstate Commerce Commission lawfully require a state to raise its intrastate freight rates to the interstate level when said Commission fails to find affirmatively:

(a) What contribution from intrastate traffic would constitute a fair proportion of the railroads' total income;

(b) What amount of revenue is required to enable the railroads to operate efficiently;

(c) That the state-prescribed intrastate rates are less than compensatory or insufficient to cover the full cost of service; and

(d) That the maintenance of the intrastate freight rates at the interstate level will be reasonable and is necessary to the operation of a nationally efficient and adequate transportation system?

Statutes Involved

Sections 13(3), 13(4) and 15a of The Interstate Commerce Act, (Title 49 USC 13(3), 13(4) and 15a). These statutes are printed in the Appendix to this brief.

Statement

This litigation concerns the power of the Interstate Commerce Commission to *nullify* state-prescribed intrastate freight rates and the sufficiency of the findings upon which the exercise of that power has been predicated.

The historical background to this litigation has been set forth accurately and in considerable detail by the Interstate Commerce Commission in its Report of May 4, 1950, 278 I.C.C. 41, (R. 80), and by the District Court in its opinion of June 29, 1951, 101 F. Supp. 941, (R. 132). It is believed that a general statement of the ultimate facts will be sufficient for the purpose of this brief.

In 1946 in Docket Ex Parte No. 162, reported in 266 I.C.C. 162, (R. 83), and again in 1948 in Docket Ex Parte No. 166, reported in 270 I.C.C. 403, (R. 84), the Interstate Commerce Commission authorized general increases in railroad freight rates of varying percentages in the different sections of the United States. In southern territory, which includes the State of Florida, the 1946 increases in interstate traffic were 20 percent and the 1948 increases were 25 percent, subject in each instance to certain maximum amounts on particular commodities and to specified flat increases on others. In 1947 the Florida Railroad and Public Utilities Commission authorized increases (R. 83) on Florida intrastate traffic similar to the 1946 interstate increases in southern territory, except that increases on pulpwood were limited to 9 percent and no increases were allowed on (a) logs moving to the mills, (b) wet phosphate moving from the washer to the drying plant, (c) wastewood moving to retort or recovery plant, and (d) sugar cane moving to the mills. In 1948 the Florida Commission dealt with applications of the rail lines for general increases similar to those authorized by

the Interstate Commerce Commission in its Ex Parte No. 166 proceeding and, whereas the Interstate Commerce Commission had authorized a 25 percent increase on interstate traffic in southern territory, the Florida Commission authorized a 20 percent general increase on Florida intrastate traffic (R. 84), with the following exceptions:

(1) No increases were allowed on protective services, wastewoods to Pensacola, Florida, sugar cane from the fields to the mill in Clewiston, Florida, or fertilizer and fertilizer materials;

(2) Increases on road aggregates were limited to 10 percent; and

(3) Increases on class rates and rates made in relation thereto were limited to 10.25 percent.

Thus, the Florida Commission granted the rail lines the same increases in intrastate freight rates as were granted by the Interstate Commerce Commission in Dockets Ex Parte 162 and 166, with the exception of 5 percent granted by the Interstate Commerce Commission in Ex Parte No. 166 and the commodity and class rate exceptions which we have previously enumerated in this statement.

On December 3, 1948 *seven* of the *fourteen* common carrier railroads operating within the State of Florida filed a petition with the Interstate Commerce Commission (R. 28) charging that, as the result of the refusal of the Florida Commission to grant the same increases in intrastate rates as the Interstate Commerce Commission had granted with respect to interstate rates, the Florida intrastate rates cause undue and unreasonable advantage, preference and prejudice as between persons and localities in intrastate commerce in Florida, on the

one hand, and interstate commerce, on the other hand, and undue, unreasonable, and unjust discrimination against interstate commerce. The petition also charged that the Florida rates deprive the rail lines of large amounts of revenue to which they are entitled and which it is necessary for them to have in order that they may furnish adequate and efficient transportation service, and that this loss in revenue results in an undue burden upon and a discrimination against interstate commerce and undue preference of intrastate commerce.

The Interstate Commerce Commission held a hearing on the petition of the railroads and at the close of said hearing the Florida Commission made a motion to dismiss the petition (R. 569) on the following grounds, among others, that:

(1) The evidence herein is insufficient to support a finding that Florida intrastate traffic is not contributing its fair and proportionate share of the revenue required to enable respondents (railroads) to render adequate and efficient transportation service;

(2) The evidence fails to show the rates complained of are abnormally low or less than reasonably compensatory or insufficient to cover the full cost of service;

(3) It affirmatively appears from the record herein that the respondents' financial distress, if any, is caused by enormous deficits in their passenger operations which they unlawfully seek to impose upon the shippers and receivers of freight; and

(4) There is no evidence in the record herein from which the Commission can find the amount of revenue required from Florida intrastate freight operations in order that said intrastate freight operations may con-

tribute their fair, just and proportionate share of the revenue requirements of the respondents.

On May 4, 1950 the Interstate Commerce Commission denied the Florida Commission's motion to dismiss (R. 121) and made the following findings (R. 118) upon which it subsequently predicated its order of July 25, 1950 (R. 129) nullifying the state-prescribed Florida intrastate rates:

"2. That the transportation conditions incident to the intrastate transportation of freight in Florida are not more favorable and such conditions in the Florida peninsular are somewhat less favorable than those (1) within southern territory and (2) between Florida and interstate points.

"3. That the present interstate freight rates and charges within Florida and between points in Florida and points in other States are just and reasonable, including those proposed within Florida in I. & S. No. 5646, to the extent above found just and reasonable; and that intrastate rates, charges, and minimum weights herein approved will not exceed a just and reasonable level.

"4. That there is active competition between localities engaged in interstate commerce between points in Florida and points in other Southern States, on the one hand, and localities engaged in intrastate commerce in Florida, on the other hand, and that this competition extends for all practical purposes throughout the entire State of Florida and to class and commodity traffic generally, but not including sugar cane to the mill, molasses, and, for short hauls, mixed fertilizer and a few other commodities.

"5. That the Florida intrastate rates, charges, and minimum weights, which are below the level herein authorized, are abnormally low and are not contributing

their fair share to the revenues required by respondents to enable them to render adequate and efficient service and to operate profitably, and thereby accomplish the purpose of the Interstate Commerce Act, and as set forth in the national transportation policy declared by the Congress, to develop and preserve a national transportation system adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense; and that the burden thus cast upon interstate commerce is undue to the extent that these intrastate rates and charges are less than they would be on the basis herein approved.

"6. That the establishment of intrastate rates and charges increased sufficiently to equal the level herein approved will substantially increase respondents' revenues therefrom, and will constitute not more than a fair proportion of respondents' total income, not taking into consideration the Ex Parte 168 increases.

"7. That the maintenance of intrastate rates and charges within Florida on bases lower than those herein approved causes, and in the future will cause, (1) in all instances, unjust discrimination against interstate commerce, (2) in nearly all instances, undue preference of and advantage to localities in intrastate commerce, and undue prejudice to localities in interstate commerce; and (3) undue and unreasonable advantage and preference to intrastate shippers of cement, particularly those at Tampa, Fla., and undue prejudice to interstate shippers, especially those at Clinchfield, Ga.

"8. That this unjust discrimination and undue prejudice should be removed by establishing intrastate rates and charges between points in Florida which will reflect the same increases as are, and for the future may be, maintained by respondents on like interstate traffic to and from Florida, and within Florida under our authorizations in Ex Parte No. 162 and Ex Parte No. 166,

modified as herein indicated and as proposed before the Florida Commission in proceedings referred to herein: provided, that, under these findings, (1) on sugar cane, the present Florida intrastate transit rates should be increased to reflect the Ex Parte 162 and Ex Parte 166 increases but the minimum weights thereon should be the same as the minima authorized in I. & S. No. 5646, and the present high unused Florida intrastate non-transit rates should not be increased, except as necessary to observe as a minimum the Florida intrastate transit rates increased as herein authorized; (2) that on wastewood, the increased intrastate rates, minimum 40,000 pounds, authorized herein, shall alternate with intrastate rates, minimum 60,000 pounds, which latter rates shall not exceed the interstate rates, minimum 60,000 pounds applicable, from August 21, 1948, to, but not including, January 11, 1949, the effective date of the initial interim increases authorized in Ex Parte No. 168, for corresponding distances from Coast Line stations in Florida to Brunswick, Ga.; (3) that on pulpwood, no increase shall be made in Florida joint-line charges nor in Florida single-line distance rates which would cause those rates or charges to exceed the level of the corresponding rates contemporaneously maintained in interstate traffic during the foregoing period from or to Florida points under the Roanoke Rapids scale; (4) that on fertilizers and fertilizer materials, no increase shall be made in Florida single-line intrastate rates which will cause such rates to exceed the level of the single-line intrastate rates maintained by the Florida East Coast Railway immediately prior to January 11, 1949, the effective date of the initial interim increases authorized in Ex Parte No. 168; (5) that no intrastate rate or charge shall be increased so that it will exceed the lowest level of the corresponding rates or charges contemporaneously maintained generally on interstate traffic to and from Florida points in the period from August 21, 1948, to, but not including, January 11, 1949; and (6) that the foregoing provisions shall be construed so as to make due allowance for dif-

ferences in minimum weights and for the Florida peninsular arbitraries where applicable."

On September 16, 1951 the Florida Commission filed a civil action (R. 1) against The United States of America in the District Court for the Northern District of Florida under Title 28 USC Section 1336, and others, seeking to permanently enjoin, set aside and annul the order of the Interstate Commerce Commission dated July 25, 1950. Two short-line railroads, the Florida Citrus Commission, the Growers and Shippers League of Florida and numerous shippers intervened in support of the Florida Commission (R. 133). The Interstate Commerce Commission and all Class I railroads operating in Florida intervened as parties defendant (R. 133).

The District Court sustained the order of the Interstate Commerce Commission (R. 139) and as the basis for its action stated that (R. 136):

"The respective parties to this suit appear to be in accord on the proposition that the Interstate Commerce Commission heard and determined Ex Parte #162 and #166 primarily as revenue cases. They also appear to be in accord that the carriers are making substantial profits out of their over-all freight services and that, considered alone, increases in freight rates would not have been justified on the ground that the carriers needed additional revenue to pay the costs of rendering freight services and a fair return on the carriers' property devoted to such services. The parties are further in accord that the carriers are sustaining heavy losses resulting from passenger operations. Moreover, the evidence before the Interstate Commerce Commission in this case clearly establishes these facts. We conclude from this evidence that the increases in rates authorized

by the Interstate Commerce Commission, in Docket #30140, were authorized chiefly because of losses resulting from passenger operations. Increased labor costs accounted for some increased expenses of the carriers, but the principal losses being incurred arose out of passenger operations.

"The question, therefore, before the court is — may the Interstate Commerce Commission increase freight rates generally to enable the carriers to meet deficits incurred from passenger operations?

"Plaintiffs contend this may not be done; that every branch of the service must contribute its proper share of the costs of operation and return on the property devoted to each class of service. They rely upon the 5% Case, 31 I. C. C. 351, Northern Pacific Railway v. North Dakota, 236 U. S. 585, Norfolk & Western Railway v. West Virginia, 336 U. S. 605, and other cases to the same effect.

"The cases relied upon by plaintiffs to support this proposition were decided prior to 1940 when the Interstate Commerce Act was amended by including therein the National Transportation Policy, which the Interstate Commerce Commission was directed to follow in prescribing rates and charges on all modes of transportation subject to the provisions of the Act, 49 U. S. C. 4281. In Railroad Commission v. Chicago, B. & Q. Railroad Company, 257 U. S. 563 and again in Florida v. U. S. 292 U. S. 1, the Supreme Court of the United States held that the Transportation Act, 1920, imposed an affirmative duty on the Interstate Commerce Commission 'to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States.' And, again in North Carolina v. United States, 325 U. S. 507, the Supreme Court re-affirmed these earlier holdings and held that where intrastate traffic was not contributing its fair share of the rev-

enue required to enable the carriers to render adequate and efficient transportation service an order of the Interstate Commerce Commission directing an increase in intrastate rates, for such purpose, would be valid, if supported by evidence justifying the order.

"Relying upon these decisions of the Supreme Court of the United States, this court finds and holds that the Interstate Commerce Commission, in this case, had the authority to enter the order here questioned for the purpose of providing the carriers with needed revenue, even though freight rates were increased beyond the point where such rates provided more revenue than was required to pay the costs for rendering freight services and a fair return on carriers' property devoted to such services.

"Plaintiffs contend that should the court find that the Interstate Commerce Commission is vested with authority to increase freight rates, generally, to enable the carriers to meet deficits from passenger operations, nevertheless, the order of the Interstate Commerce Commission, in this case, does not comply with all the requirements laid down by the Supreme Court of the United States in North Carolina v. United States, supra. We think it does.

"While it is doubtful if the order of the Interstate Commerce Commission, in Docket #30140, could be sustained, on the grounds that the action of the Florida Commission resulted in undue and unreasonable advantages, preference or prejudice, as between persons and localities, in intrastate commerce in Florida on the one hand and interstate commerce on the other (Florida v. U. S., 282 U. S. 194), yet, it is clear from the evidence in the case that it did result in undue, unreasonable and unjust discrimination against interstate commerce and undue preference as to intrastate commerce, in violation of Section 13(4) of the Interstate Commerce Act, in that it failed to place upon intrastate commerce the burden cast upon such com-

merce, by the order of the Interstate Commerce Commission, entered in Ex Parte #162 and #166, which was intended to provide needed revenue from both intrastate and interstate commerce, to meet the money requirements of the carriers."

From the final judgment of the District Court sustaining the order of the Interstate Commerce Commission, this appeal has been taken.

Summary of Argument

A. *Freight Rates May Not Be Increased To Meet Deficits Incurred From Passenger Operations.* It is the contention of appellants that Florida intrastate freight traffic under state-prescribed rates was contributing its fair share toward the maintenance of an adequate national transportation system, that were it not for carriers' passenger deficits there would have been no reason for the railroads to request further increases in their revenues, and that the Interstate Commerce Commission unlawfully required the Florida rates to be raised above a reasonable level.

There is no disagreement concerning the consideration given passenger deficits in this case. The District Court recognized (R. 136) that the Interstate Commerce Commission required the Florida rates to be increased chiefly because of losses resulting from passenger operations and held that this could be done (R. 137) even though freight rates thus were increased beyond the point where such rates would provide more revenue than would be required to pay the costs of rendering freight services and give the carriers a fair return on their property devoted to such services. We contend that rates which will produce such results exceed a reasonable level and are unlawful.

Florida's position with reference to the use of passenger deficits to justify freight rate increases is identical with that formerly held by the Interstate Commerce Commission itself when in the *Five Percent Case, 31, I.C.C. 351,* it announced that:

> "We know of no provision of law under which we should be justified in increasing freight rates to provide a return upon property used exclusively in the passenger service, much less to take care of losses incurred in such service."

The Interstate Commerce Commission has subsequently departed from the sound position announced by it in the *Five Percent Case* and has now arrived at the conclusion (R. 112) that it feels "compelled in a general rate case to take the passenger deficit into account in adjustment of freight rates and charges." In explanation of its present position the Commission has said that "Naturally, this course is borne out of the exigencies of the industry, and leaves us free for subsequent examination of the question when particularized by complaint or in an investigation of our own." The "exigencies of the industry," we maintain, are not sufficient to justify the exercise of an unauthorized power.

In *Norfolk & Western Ry. Co., vs. West Virginia, 236 U.S. 605,* this Court, in striking down a West Virginia statute which provided for unreasonably low passenger fares, recognized and applied the same principle for which we are contending here when it said:

> "The passenger traffic is one of the main departments of the company's business; it has its separate equipment, its separate organization and management, and, of necessity, its own rates. In making a reasonable

adjustment of the carrier's charges, the state is under no obligation to secure the same rate of return from each of the two principal departments of business, passenger and freight; but the state may not select either of these departments for arbitrary control. Thus, it would not be contended that the state might require passengers to be carried for nothing, or that it could justify such action by placing upon the shippers of goods the burden of excessive charges in order to supply an adequate return for the carrier's entire service."

More recently, this court in the North Carolina passenger fare case, *North Carolina vs. United States, 325 U. S. 507*, held that:

"The power of the Commission to require states to raise their intrastate rates depends upon whether intrastate traffic is contributing its fair share of the earnings required to meet maintenance costs and to yield a fair return on the value of property devoted to the transportation service, both interstate and intrastate. . . . *But the Commission cannot require intrastate rates to be raised above a reasonable level.*" (Emphasis supplied by us)

The District Court (R. 136) called attention to the fact that the cases relied upon by the Florida Commission (The Five Percent Case and the West Virginia Case) were decided prior to 1940 when the Interstate Commerce Act was amended by including therein the National Transportation Policy which now controls the fixing of rates and charges for all modes of transportation subject to the Act. But, we submit the National Transportation Policy cannot be construed so as to justify or condone the imposition of excessive and unreasonably high freight rates upon intrastate shippers of goods so that carriers

may be able to offset or recoup losses sustained through the operation of passenger service.

B. *Findings Essential To Validity of Order Nullifying State-Prescribed Rates.* This Court has held many times that the Interstate Commerce Commission is without authority to supplant a state-prescribed intrastate rate unless there are clear findings, supported by evidence, of each element essential to the exercise of that power by the Commission. We contend that the Interstate Commerce Commission has failed to make those essential findings in this case.

In the North Carolina passenger fare case, *North Carolina vs. United States*, decided on June 11, 1945, and reported in *325 U.S. 507*, this Court, in holding that the order of the Interstate Commerce Commission was not based on adequate findings supported by evidence, pointed out that the Commission made no findings as to what contribution from intrastate traffic would constitute a fair proportion of the railroads' total income; that the Commission made no findings as to what amount of revenue was required to enable those railroads to operate efficiently; that the Commission did not find that the railroad rates involved there were less than compensatory or insufficient to cover the full cost of service; that the Commission did not find that the maintenance of those rates was necessary to the operation of a nationally efficient and adequate transportation system; and that the Commission made no findings as to the reasonableness of the proposed rates.

Virtually the same infirmities are to be found in the order of the Interstate Commerce Commission in the present case. Clear findings of the various elements which

this Court has said are essential have not been made and cannot be made in this case because there is no evidence in the record to support them. There is nothing here but a disparity in rates and that is not enough to justify the Interstate Commerce Commission in nullifying state-prescribed intrastate rates.

Argument

I.

Freight Rates May Not Be Increased To Meet Deficits Incurred From Passenger Operations

The Interstate Commerce Commission has required Florida intrastate freight rates to be raised to the interstate level because of the enormous deficits sustained by the railroads from the operation of their passenger service. Florida intrastate freight traffic was already contributing, under state-prescribed rates, more than its fair share of the total income of the carriers.

There is no disagreement concerning the impact these passenger deficits have had upon the freight rates in question. The opinion of the District Court specifically states that the respective parties to this litigation (R. 136):

> ". . . appear to be in accord that the carriers are making substantial profits out of their over-all freight services and that, considered alone, increases in freight rates would not have been justified on the ground that the carriers needed additional revenue to pay the costs of rendering freight services and a fair return on the carriers' property devoted to such services. The parties are further in accord that the carriers are sustaining heavy losses resulting from passenger operations. Moreover, the evidence before

> the Interstate Commerce Commission in this case clearly establishes these facts. We conclude from this evidence that the increases in rates authorized by the Interstate Commerce Commission, in Docket No. 30140, were authorized chiefly because of losses resulting from passenger operations."

The District Court, after recognizing that Florida's intrastate freight rates have been increased by the Interstate Commerce Commission because of carriers' passenger deficits, then reached this alarming conclusion (R. 137):

> ". . . this court finds and holds that the Interstate Commerce Commission, in this case, had the authority to enter the order here questioned for the purpose of providing the carriers with needed revenue, even though freight rates were increased beyond the point where such rates provided more revenue than was required to pay the costs for rendering freight services and a fair return on carriers' property devoted to such services."

Thus it is, that this litigation grows out of a unique proceeding—a 13th Section proceeding to increase state-prescribed intrastate freight rates not because they are too low, *but because losses from passenger operations are too high!* This is apparent when consideration is given to the fact that for the year 1948, the last full year's operations involved in this litigation, the three major railroads operating in Florida had a *net railway operating income* of only TWENTY MILLION DOLLARS, while for the same year their *net railway operating income* FROM FREIGHT SERVICE ALONE was FORTY-ONE MILLION DOLLARS. Their system deficit from passenger service for that year was TWENTY-ONE MILLION DOLLARS. In other words, more than fifty

cents out of every dollar net railway operating income earned by these railroads from their freight services goes toward the payment of their passenger losses.

The Florida Commission's position on this question is *identical* with that formerly held by the Interstate Commerce Commission itself when in the *Five Percent Case, 31 I.C.C. 351*, it announced the sound conclusion that:

> "We know of no provision of law under which we should be justified in increasing freight rates to provide a return upon property used exclusively in the passenger service, much less to take care of losses incurred in such service. In our opinion each branch of the service should contribute its proper share of the cost of operation and of return upon the property devoted to the use of the public."

Insofar as state prescribed rates are concerned, the foregoing construction by the Interstate Commerce Commission is in consonance with two decisions of this Court, one involving the freight rates on lignite and the other passenger fares.

In *Northern Pac. Ry. v. North Dakota, 236 U. S. 585*, decided March 8, 1915, this Court found that a statute of North Dakota prescribing a distance scale of rates on lignite compelled the railroads to transport coal for less than the proper cost of transportation, or virtually at cost, and thus the carriers were denied a reasonable reward for their services in violation of the due process clause of the Fourteenth Amendment.

The Court said at pages 597 and 598:

> "The State cannot estimate the cost of carrying coal by throwing the expense incident to the maintenance

of the roadbed, and the general expenses, upon the carriage of wheat; or the cost of carrying wheat by throwing the burden of the upkeep of the property upon coal and other commodities. This, of course, does not mean that all commodities are to be treated as carried at the same rate of expense. The outlays that exclusively pertain to a given class of traffic must be assigned to that class, and the other expenses must be fairly apportioned. It may be difficult to make such an apportionment, but when conclusions are based on cost the entire cost must be taken into account. * * *

"It does not aid the argument to urge that the State may permit the carrier to make good its loss by charges for other transportation. If other rates are exorbitant, they may be reduced. Certainly, it could not be said that the carrier may be required to charge excessive rates to some in order that others might be served at a rate unreasonably low. That would be arbitrary action."

Simultaneously, in *Norfolk & W. Ry. Co. v. West Virginia, 236 U. S. 605*, this Court found that a statute of West Virginia providing for a passenger fare of 2 cents per mile, afforded such a narrow, if any, margin over the cost of the service that the railroad was forced to carry passengers, if not at or below cost, with merely a nominal reward. The law was held to be invalid because in violation of the due process clause of the Fourteenth Amendment. The Court said at page 609:

"The passenger traffic is one of the main departments of the company's business; it has its separate equipment, its separate organization and management, and, of necessity, its own rates. In making a reasonable adjustment of the carrier's charges, the state is under no obligation to secure the same rate

> of return from each of the two principal departments of business, passenger and freight; but the state may not select either of these departments for arbitrary control. Thus, it would not be contended that the state might require passengers to be carried for nothing, or that it could justify such action by placing upon the shippers of goods the burden of excessive charges in order to supply an adequate return for the carrier's entire service."

These two decisions of this Court stand for the proposition that a state cannot justify excessively low passenger fares by placing upon the shippers of goods the burden of excessive charges in order to supply an adequate return for the carriers' entire service. Neither of these decisions has ever been reversed, overruled or modified in any respect, either directly or by implication. As a matter of fact, they have been cited with approval for one reason or another by this Court, the Circuit Courts of Appeal and the Federal District Courts in more than a score of cases. The last reference to either of them by this Court appears to have been in the case of *New York vs. United States,* decided in 1947 and reported in 331 U. S. 338, and the reference there contained the clear inference that for constitutional reasons each form of transport service must stand on its own bottom. Likewise, these two cases have been followed by the supreme courts of more than twenty-four different states. In the majority of instances they have been brought to the attention of the courts by the railroads themselves as the controlling law.

Since its decision in the *Five Percent Case,* the Commission has departed from the sound position announced in that case that freight rates cannot be increased to provide a return upon property used exclusively in the

passenger service. Subsequent decisions of the commission have finally arrived at the conclusion that it feels "compelled in a *general rate case* to take the passenger deficit into account in adjustment of freight rates and charges".

In its most recent expression on this vital matter and partly in explanation of its position the Commission has said that "Naturally, this course is borne out of the exigencies of the industry, and leaves us free for subsequent examination of the question when particularized by complaint or in an investigation of our own".

Taking into consideration the long and extended history of passenger deficits of the railroads, we are wondering how long this rather normal situation can be treated as an emergency or as the Commission puts it "the exigencies of the industry". It seems to us that some solution should be sought which would not *penalize the freight shippers.*

Under the decisions of this Court, the State of Florida, in fixing intrastate rates, cannot impose upon the shippers of goods the burden of excessive freight rates in order to compensate for the carriers' passenger deficits. The Supreme Court of Florida has so held on more than one occasion. Likewise, we submit that when dealing with intrastate rates, the Interstate Commerce Commission cannot ignore the decisions of the United States Supreme Court in the Northern Pacific and the Norfolk & Western cases.

Granting for the sake of argument that there may be some justification for assessing passenger deficits against freight traffic in a general revenue case of national scope

involving exclusively interstate operations, there would appear to be no justification for similar treatment when dealing exclusively with intrastate freight rates. Modern day passenger service is predominantly interstate in character while intrastate passenger service is comparatively negligible. This is true not only with reference to the transportation of passengers but likewise the transportation of goods in passenger trains commonly referred to as the head-end services. For example, there is no intrastate transportation of milk in Florida. Most mail moves in interstate commerce. Intrastate express service is a minor function of the overall operations of that agency which is controlled by the rail lines. And yet, these head-end services are responsible for a substantial part of the so-called passenger deficits. *Increased Freight Rates, 1948, 276 ICC 9, 37.* By far the largest proportion of the deficit from these services then must of necessity stem from interstate operations and, if considered at all in an intrastate freight rate case, should serve to reduce the contribution which intrastate traffic should make to the carriers' total income rather than constitute the primary basis for requiring state-prescribed intrastate freight rates to be increased above a reasonable level.

We have made the statement more than once in this brief that Florida intrastate freight rates were contributing more than their fair share of the carriers' total income. We have also said that the Interstate Commerce Commission required the Florida rates to be raised above a reasonable level. The truth of these statements is apparent when one considers the earnings of the railroads operating within the State of Florida. The Florida East Coast Railway, which operates wholly within the State

of Florida, earned a return of 12.35% from its freight service in 1948 (R. 771, Exhibit 67) the last full year involved in this case. It is a commonly accepted fact that The Seaboard Air Line and The Atlantic Coast Line are more profitable rail lines than the Florida East Coast and while the record does not show a breakdown of the operations of these two lines the conclusion is inescapable that each of these lines had a higher return from freight operations than the Florida East Coast. Freight rates which produce such high returns are exhorbitant and unreasonable.

In the North Carolina passenger fare case, this Court said that the power of the Interstate Commerce Commission with reference to intrastate rates is dominant only so far as necessary to alter *rates which injuriously affect interstate transportation.* Can rates which produce a return in excess of 12% be said to injuriously affect interstate transportation? Certainly not, and no such charge can be successfully maintained against Florida intrastate freight rates. Freight rates cannot be said to injuriously affect interstate transportation just because passenger earnings are too low.

There is little, if any, regulation of interstate passenger service. That is, no regulatory agency undertakes to determine *how much* passenger service the rail lines shall provide. The states, in most instances, exert some control over intrastate passenger service in that such service may not be withdrawn or curtailed without the consent of the state. However, in this phase of their regulatory functions the states are met with a most frustrating device on the part of the railroads. Frequently a railroad will seek to curtail some part of the meager intrastate passenger service it renders within a given state.

In most such instances the state regulatory agency attempts to take into consideration the overall earnings of the particular branch or line from which the passenger service is sought to be withdrawn. Immediately the railroads take the position that this cannot be done, THAT EARNINGS FROM FREIGHT SERVICE CANNOT BE TAKEN INTO CONSIDERATION IN DETERMINING WHETHER PASSENGER SERVICE SHOULD BE CURTAILED, *A.C.L.R. Co. vs. Fla. RR. & PU. Com., 96 F. Supp. 583, 586.* The railroads are quick to use the passenger deficits to justify increases in freight rates and, then, having secured the higher freight rates, they use the same passenger deficits to justify curtailing the passenger service. The result is that the public is being deprived in many instances of that service which has already been subsidized by the shippers of freight through excessive and unreasonable freight rates.

While we recognize that it may not be easy to say that intrastate freight rates cannot be increased to take care of passenger deficits, and that such a decision will pose serious problems for the railroads, nevertheless, this problem of passenger deficits will never be solved so long as the railroads are permitted to incur these deficits without limitation and then pass them on to the shippers of freight through the application of exhorbitant and unreasonable freight rates.

There is nothing in the Interstate Commerce Act which justifies the action of the Interstate Commerce Commission in requiring state-prescribed intrastate freight rates in Florida to be raised to the interstate level in order that the rail lines may be able to offset losses incurred in their passenger operations. Such unwarranted action violates the letter and the spirit of the National Trans-

portation Policy and ought to be condemned by this Court.

It is the National Transportation Policy, among other things, to promote economical service, to encourage the maintenance of reasonable charges for transportation services, without unjust discriminations, and to cooperate with the states and the duly authorized officials thereof, all to the end of developing and preserving a national transportation system adequate to meet the needs of commerce, of the Postal Service, and of the national defense. The imposition of exhorbitant and unreasonable freight rates to take care of passenger deficits is contrary to these express purposes of the Interstate Commerce Act. There can be no justification for selecting one class of citizens, the shippers of freight, and imposing upon them the burden of maintaining an adequate transportation system for the nation as a whole particularly when they are already contributing more than their fair share to the revenues required for the maintenance of such a transportation system. The continued practice of permitting the railroads to recover passenger deficits by the simple expedient of increasing freight rates not only fails to promote economical transportation service but completely removes the necessity of finding a solution to the problem of passenger deficits.

Florida intrastate freight traffic, already contributing more than its fair share of the railroads' total income, has been required unlawfully by the Interstate Commerce Commission to bear the additional burden of reimbursing the railroads for losses sustained through the operation of passenger trains. The order of the Interstate Commerce Commission which so clearly violates the letter

and spirit of the National Transportation Policy should have been vacated by the District Court.

II.

Findings Essential to Validity of Order Nullifying State-Prescribed Rates.

This Court has held many times that the Interstate Commerce Commission is without authority to supplant a state-prescribed rate unless there are clear findings, supported by evidence, of each element essential to the exercise of that power by the Commission. We contend that the Interstate Commerce Commission has failed to make those essential findings in this case.

It appears to be definitely settled by a recent decision of this Court, *North Carolina vs. United States*, decided on June 11, 1945, and reported in *325 U. S. 507, 89 L. Ed. 1760*, that the power of the Interstate Commerce Commission to require states to raise their intrastate rates depends upon whether intrastate traffic is *contributing its fair share* of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of the property directed to the transportation service, both interstate and intrastate.

In the North Carolina Case this Court said that:

"Section 13(4) does not relate to the Commission's power to regulate interstate transportation as such. As to interstate regulation, the Commission is granted the broadest powers to prescribe rates and other transportation details. See *United States v. Pennsylvania R. Co. Nos. 47, 48, decided January 29, 1945 (323 US 612, ante, 499, 65 S Ct 471)*. No such breadth of authority is granted to the Commission over

purely intrastate rates. Neither § 13 (4), nor any other congressional legislation, indicates a purpose to attempt wholly to deprive the states of their primary authority to regulate intra-state rates. Since the enactment of § 13 (4), as before its enactment, a state's power over intra-state rates is exclusive up to the point where its action would bring about the prejudice or discrimination prohibited by that section. When this point—not always easy to mark—is reached, and not until then, can the Interstate Commerce Commission nullify a state-prescribed rate.

The Court then said:

"Before the Commission can nullify a state rate, justification for the 'exercise of the federal power must clearly appear.' *Florida v. United States, 282 US 194, 211, 212, 75 L ed 291, 301, 302, 51 S Ct* 119. *See also Yonkers v. United States, 320 US 685, 88 L ed 400, 64 S Ct 327.* And the intention to interfere with the state's rate-making function is not to be presumed. *Arkansas R. Commission v. Chicago, R. I. & P. R. Co. 274 US 597, 603, 71 L ed 1224, 1228, 47 S Ct 724;* nor must its intention in this respect be left in serious doubt. *Illinois Commerce Commission v. Thomson, 318 US 675, 684, 685, 87 L ed 1075, 1081, 1082, 63 S Ct 834.* The foregoing cases also stand for the principle that the Interstate Commerce Commission is without authority to supplant a state-prescribed intra-state rate unless there are clear findings, supported by evidence, of each element essential to the exercise of that power by the Commission."

In discussing those elements which are *essential* to the exercise of the Commission's power under Section 13 of the National Transportation Act, this Court went on to say (page 515):

"Neither in its formal findings, nor in its discussion of the facts, did the Commission indicate that the North Carolina railroad rates here involved were less than compensatory or insufficient to cover the full cost of service. Nor did they find that maintenance of these rates was necessary to the operation of a nationally efficient and adequate railway system. . . .

". . . The Commission made no findings as to what contribution from intra-state traffic would constitute a fair proportion of the railroad's total income. It made no finding as to what amount of revenue was required to enable these railroads to operate efficiently. Instead, it relied on the mere existence of a disparity between what it said was a reasonable interstate rate and the intra-state rate fixed by North Carolina. . . .

". . . The purpose of the National Transportation Law is to assure railroads a fair net operating income and no more. . . . The power of the Commission to require states to raise their intra-state rates depends upon whether intra-state traffic is contributing its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property directed to the transportation service, both interstate and intra-state. . . . But the Commission cannot require intra-state rates to be raised above a reasonable level."

In concluding its opinion in the North Carolina case this Court said that:

"Without such findings supported by evidence, the Commission was not authorized to find that the intra-state rates discriminated against interstate commerce."

What contribution from intrastate traffic would constitute a *fair proportion* of the railroads' total income in the present case? How are you to determine what a *fair contribution* is? *What contribution* is Florida intrastate traffic now making to the railroads' total income? We believe that we are entitled to an answer to these questions under the controlling decisions of this Court before our intrastate freight rates are increased by order of the Interstate Commerce Commission; and yet it is wholly impossible to ascertain the answers to those questions from this record.

How can the Interstate Commerce Commission make such a finding in a case such as this where there has been no separation of interstate and intrastate operations, revenues, expenses and investments? Certainly in the present case there is not one scintilla of evidence from which the Commission or the Court can find *what contribution* from intrastate traffic in Florida would *constitute a fair proportion* of the railroads' total income. As pointed out by the Court in the North Carolina case the Interstate Commerce Commission is without authority to supplant a state prescribed intrastate rate unless there are clear findings, *supported by evidence*, of each element *essential* to the exercise of that power by the Commission.

The formal finding by the Interstate Commerce Commission that (R. 119) the Florida intrastate rates were not contributing their fair share to the revenues required by the railroads to enable them to render adequate and efficient service and to operate profitably is an unwarranted conclusion, contrary to the evidence in this record, and supported only by a disparity in the interstate and

the intrastate rates. The Commission made no effort to determine what Florida's contribution was under the state-prescribed rates. Neither did the Commission make any effort to determine what Florida's contribution should be. All that the Commission did was to assume that Florida's contribution prior to the interstate increases was a valid criterion of fairness (R. 112). The Commission then reasoned that after the interstate rates were increased approximately 45% in the two cases, Ex Parte 162 and 166, and the intrastate rates were correspondingly increased only about 40%, Florida's contribution then became smaller and therefore constituted less than her fair share of the railroads' revenue requirements. This was a feeble and, we submit, abortive attempt on the part of the Interstate Commerce Commission to comply with the decisions of this Court that there must be a clear finding, supported by evidence, of what contribution from intrastate traffic will constitute a fair proportion of the railroads' total income. Stripped of its sophistry the Commission's finding is simply that there is a disparity in the interstate and the intrastate rates and because of that disparity Florida's intrastate traffic is not contributing its fair share of the railroads' revenue requirements. But, the mere existence of a disparity between rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates. *Florida v. United States, 282 US 194, 211, 212.*

In the North Carolina passenger fare case, this Court, in holding that the order of the Interstate Commerce Commission was not based on adequate findings supported by evidence, pointed out that the Commission made *no findings as to what contribution* from intrastate traffic

would constitute a *fair proportion* of the railroads' total income; that the Commission made *no findings* as to *what amount* of revenue was required to enable those railroads to operate efficiently; that the Commission *did not find* that the railroad rates involved there were less than compensatory or insufficient to cover the full cost of service; that the Commission *did not find* that maintenance of those rates was necessary to the operation of a nationally efficient and adequate transportation system; and that the Commission made *no findings* as to the reasonableness of the proposed rates.

We submit that these are essential findings in a case of this kind and that they have not been made and cannot be made in the present case because there is no evidence in the record to support them. Without such findings supported by evidence, the Commission was not authorized to find that Florida's intrastate freight rates discriminated against interstate commerce. The Commission's finding that the Florida intrastate rates resulted in undue and unreasonable advantage, preference and prejudice, in nearly all instances, as between persons and localities in intrastate commerce in Florida on the one hand and interstate commerce on the other, was not sustained by the District Court. On the contrary, the Court pointed out (R. 137) that it is doubtful that the order could be sustained on those grounds. Certainly, a general sweeping order against all intrastate rates may not be predicated upon the Commission's findings of discrimination against particular persons and locations. *Railroad Commission v. Chicago B. & O. R. Co., 257 US 563.* The court did sustain the Commission's finding that the Florida intrastate rates caused undue discrimination against interstate commerce; however, as we have

attempted to point out, this ultimate conclusion was not predicated upon clear findings of those elements which this Court has held are essential to the validity of the Commission's order.

III.
Conclusion

When the Interstate Commerce Commission required the Florida intrastate freight rates to be raised to the interstate level in order that the railroads might be able to recoup losses sustained in their passenger operations it acted without lawful authority because:

1. Losses incurred from passenger services are not a proper burden to be placed upon the shippers of goods;

2. Florida's intrastate freight traffic was already contributing more than its fair share of the railroads' total income;

3. The resulting intrastate freight rates are exorbitant and excessively high and the Commission cannot require state-prescribed intrastate rates to be raised above a reasonable level;

4. The Commission failed to make clear findings, supported by evidence, of each element essential to the validity of such an order;

5. The Commission made no specific findings as to what amount of revenue was required to enable the railroads to operate efficiently; and

6. The Commission made no specific findings as to what contribution from Florida intrastate traffic would constitute a fair proportion of the railroads' total income.

Because the Commission acted without lawful authority in assessing passenger deficits against freight shippers, and because the Commission's order was not based on adequate findings, supported by evidence, the District Court should have declined to enforce its order. The judgment of the District Court, therefore, should be reversed.

Respectfully submitted,

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LEWIS W. PETTEWAY,
Counsel for Appellants.

APPENDIX

Section 13 (3)

"Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part or part III with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part or part III."

Section 13 (4)

"Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which

is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

Section 15a

"In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing brief upon all parties of record in this proceeding, by mailing a copy thereof properly addressed to each such party as required by the Rules of Practice.

Dated at Tallahassee, Florida, this ..... day of September, 1952.

LEWIS W. PETTEWAY, of Counsel.